

October 2, 2009

Col. Jim Konrad, Director Division of Enforcement Minn. Dept. of Natural Resources 500 Lafayette Road St. Paul, MN 55155-4040	
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RE: In the Matter of the Appeal of the Civil Citation Issued to Larry Herbert Engel, Citation No. 145614; OAH Docket No. 11-2000-20686-2

Dear Col. Konrad:

A Prehearing Conference was conducted in this matter on September 3, 2009. Administrative Law Judge Barbara L. Neilson, Conservation Officer Colleen Adam, and Larry Herbert Engel participated in the conference call. At the conclusion of the Prehearing Conference, all participants agreed that no formal hearing would be needed and that the Administrative Law Judge would make a recommendation in this matter based on the record created during the telephone conference.

On April 10, 2009, Officer Adam issued a civil citation to Mr. Engel for violating Minn. Stat. § 84.773, subd. 1(1). That statute prohibits the intentional operation of an off-highway vehicle on a trail on public land that is designated or signed for nonmotorized use only.

The Citation is based on an incident that occurred on November 9, 2008, during firearms deer hunting season. On that date, Officer Adam observed a gray Jeep Cherokee parked on a designated snowmobile trail located on County-administered tax-forfeited lands off of Horizon Drive in Hubbard County. She took a photograph of the vehicle and noted its license plate number, but did not see anyone nearby. According to the Initial Complaint Report prepared by Officer Adam, she came across a group of hunters as she proceeded along the trail who told her that "earlier they saw a white Ford pickup with an adult male

and a younger male open the closed gate and put it back on the post with the gray jeep right behind them.” Officer Adam took photographs of the open gate, post, and chain/lock that had been ripped out of its anchor point. She asserted that she had checked the area at issue on November 7, 2008, two days before the incident, and observed that there was a “closed, chained and locked gate” across the trail at that time. Officer Adam thereafter left the area to respond to another call. Later that day, she saw the gray Jeep parked outside Mr. Engel’s home.¹

Officer Adam apparently did not take pictures on November 9, 2008, of the sign restricting the use of motorized vehicles on the trail. Her Initial Complaint Report does not mention the sign or describe its condition at that time. Officer Adam returned to the same area in February 2009 and took photographs of the sign,² which she testified had been damaged by bird shot. Based upon the photograph, the only words that are clearly visible on the sign are the heading (“Forest Access”) and a portion of the statement below the heading: “This walking trail [unclear] constructed to encourage timber harvest that will improve Hunting [unclear] Wildlife [unclear]”. A reference to “Hubbard [unclear] Dept” appears at the bottom of the sign.³ When this sign is compared to other signs in Hubbard County that are depicted in the photographs provided by Officer Adam, it is evident that this sign does not include the clear restrictions on motorized traffic that are found on many of those signs.⁴

Because Mr. Engel left the area for the winter, Officer Adam did not issue the citation until April 10, 2009. During a recorded conversation with Officer Adam that day, Mr. Engel admitted that the Jeep was his and that he had been deer hunting on the land in Hubbard County on November 9, 2008. Mr. Engel initially denied seeing a sign restricting motorized vehicles from the trail, but then stated that “[t]he one that was there was all shot to shit with a shotgun.” He denied that a closed gate blocked the trail on November 9, 2008. He also asserted that he did not take the gate down that day, and further indicated that there would be no reason to take down the gate because there was a road that could be taken to go around the gate. He pointed out that he had driven on that

¹ Initial Complaint Report at 1, 2, 4-6.

² Initial Complaint Report at 2, 7-9.

³ Photographs of the sign are attached to the Initial Complaint Report and the Supplemental Report.

⁴ For example, some of the other signs specify that there is “LIMITED Motor Vehicle Use, identify “PERMITTED Motorized Uses,” or announce that the roads and trails are “CLOSED TO ALL MOTORIZED USE UNTIL FURTHER NOTICE.” (Emphasis in original.)

trail during the 2007 hunting season and that Officer Adam and another conservation officer (Mike Lawrence) had told him that it was permissible because logging activity was occurring in that area.⁵

The Initial Complaint Report prepared by Officer Adam acknowledged that, in 2007, the gate was locked open for all to access the area due to ongoing logging activity. In the Report, Officer Adam asserted that, during 2007, she and retired Conservation Officer Mike Lawrence told a hunting party that included Mr. Engel that they “would not be able to drive back to ‘their’ hunting spot beyond 2007 season due to changes in Hubbard County land use policy regarding motor vehicles.” She also contended that “[i]t was explained to the hunting group at that time that the county and the state forest lands were classified as ‘limited’ and signs/symbols authorizing specific vehicle access needed to be present in order to be able to drive a particular route.”⁶ However, Mr. Engel denied that this information was provided to him, and Mr. Lawrence did not testify.

Mark Juberian, Natural Resource Manager for the Hubbard County Natural Resource Management Office, sent Officer Adam a letter dated August 19, 2009, regarding the use of this trail. The contents of this letter are at odds in certain respects with Officer Adam’s contention that the trail was customarily gated and motorized vehicles were customarily prohibited on the trail in question during deer hunting season. In the letter, Mr. Juberian noted:

This road was constructed by our department in 1982 as a timber access road. I flagged the route, and it was all new road until a point is [sic] section 1 when I followed an existing “jeep” trail. This road was used by hunters who access the area from the west via private land. As is department policy all “new” roads were gated and vehicle access restricted. Gates were placed at the start of the road and also where it merged with the existing road in section 1. This road, as you know, has been a constant source of problems as we have no way to control the vehicle access from the private land to the west, nor should we. The gate in section 1 has been torn down several times. It was for this reason that we decided to simply open the gate on the east side during rifle deer season to allow hunters the same access as those who were privy to use the private access to the west. The understanding was that it would be

⁵ See informal transcript of taped conversation between Officer Adam and Larry Engel.

⁶ Initial Complaint Report at 2; see also materials supplied with Supplemental Report.

opened, barring wet weather conditions that would compromise the integrity of the timber access road. Such was the case in 2008. The problem was it started raining just days before the opener and people did not check to see if it was opened and just assumed it was. Bottom line is this: the road will be open this year for all the aforementioned reasons coupled with the fact that with the ATV exemptions and open access from the west it is, as you know, an enforcement nightmare. I have a couple letters from disgruntled hunters and I will inform them of the situations as well, as several of their statements are erroneous.⁷

The Administrative Law Judge recommends that the Commissioner DISMISS the Citation issued to Mr. Engel on April 10, 2009, because the Department has not met its burden to establish that facts exist to support the issuance of the Citation, and to prove those facts by a preponderance of the evidence. "Preponderance of the evidence" means that the evidence establishes it is more probable that something occurred than that it did not occur. Officer Adam admittedly did not herself observe Mr. Engel take down the trail gate on November 9, 2008, and the other hunters to whom she spoke saw two individuals riding in another vehicle take down the gate. The further statement of these hunters that the Jeep was "right behind" the first vehicle is ambiguous and does not necessarily imply that Mr. Engel observed the gate being taken down and should have known the trail was closed. The other hunters did not testify and were not even identified by name in the report.

Most importantly, regardless of the condition of the Forest Access sign on November 9, 2008, and the words used on that sign, and regardless of whether the gate was open or closed, Mr. Juberian's letter provides support for Mr. Engel's contention that the County has been inconsistent in its approach to this trail and has in recent years permitted motorized vehicles during deer hunting season, at least under most circumstances. Mr. Juberian indicated that the gate installed on the trail had been torn down several times, and the County ultimately had decided to open the gate during rifle deer season. He further stated that there was an "understanding" that the trail would be opened during the 2008 firearms deer hunting season barring wet weather conditions. However, there is no evidence of how or whether this "understanding" was communicated to hunters or how they otherwise would have known that the rain prior to the opening of the 2008 season trail would cause the trail to be considered closed to

⁷ August 19, 2009, Letter to Colleen Adam from Mark Juberian.

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vehicles. Under all of these circumstances, the Department simply has not demonstrated that facts exist to support issuance of the citation.

Pursuant to Minn. Stat. § 116.072, subd. 6(e), the Commissioner of Natural Resources must wait at least five days after receipt of this Recommendation before making a final decision. Within those five days, the parties may comment on this Recommendation. The Commissioner must send a copy of the final decision to Mr. Engel. If the Commissioner fails to act within 90 days after issuance of this Recommendation, the Recommendation will become the final decision in the case.

Sincerely,

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge
Tel.: 651-361-7845

cc: Larry H. Engel
Conservation Officer Colleen Adam